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Prevention of armed conflict**The rule of law at the national and international levels**

Note verbale dated 8 February 2017 from the Permanent Mission of the Russian Federation to the United Nations addressed to the Secretary-General

The Permanent Mission of the Russian Federation to the United Nations presents its compliments to the Secretary-General of the United Nations and has the honour to state its position on General Assembly resolution 71/248, a non-consensus resolution concerning the so-called “mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under international law committed in the Syrian Arab Republic since March 2011”, as well as the report on the implementation of the resolution (A/71/755).

A number of powers vested in the “mechanism” under resolution 71/248, including those of “analys[ing] evidence” and “prepar[ing] files”, are prosecutorial in nature. However, prosecutions, criminal investigations and support of criminal investigations are not among the functions of the General Assembly. It cannot create an organ that has more powers than the Assembly itself.

In deciding to create a “mechanism” with these functions, the General Assembly acted *ultra vires* — going beyond its powers as specified in Articles 10-12 and 22 of the Charter of the United Nations, and also in violation of the Charter provisions on the division of powers between the principal organs of the United Nations.

The General Assembly has never created such mechanisms by its decisions. On some occasions, it has authorized the Secretary-General to conduct relevant negotiations with an interested State, with the prior consent of that State being a key element in such cases. Mechanisms with investigative functions or the ability to assist criminal investigations have been created only by the Security Council, which is consistent with its primary responsibility for the maintenance of international peace and security.

The establishment of such a “mechanism” without the express consent of the Syrian Arab Republic or a Security Council resolution adopted under Chapter VII of



the Charter is a grave violation of the principles of the sovereign equality of all Members of the Organization and non-intervention in their internal affairs, enshrined in Article 2 of the Charter. Clearly, General Assembly resolution 71/248 was adopted without the consent of the Syrian Arab Republic. Moreover, the resolution was drafted against its will (as expressed in its vote against the resolution and in its statements in explanation of vote).

The absence in resolution 71/248 of any reference to the basic principle of the consent of the State concerned does not abrogate that principle. Its firm and established position in the practice of the Organization ensures its enduring validity and full applicability.

After the adoption of General Assembly resolution 71/248, the Secretariat developed terms of reference for the "mechanism" (A/71/755). This document raises a number of additional issues, because it vests the "mechanism" with even broader powers.

Paragraphs 31 and 32 of the report refer explicitly to the "quasi-prosecutorial function" of the "mechanism". The report includes new powers not envisaged in resolution 71/248, including the possibility of "establish[ing] the connection between crime-based evidence and the persons responsible ... for such alleged crimes", focusing on evidence pertaining to mens rea and to specific modes of criminal liability. Similarly, paragraphs 13-19 of the report permit the "mechanism" to conduct a preliminary assessment of the sufficiency of the evidence and prepare files focusing on the criminal conduct of the persons responsible for the crimes, without any distinction based on their affiliation or official capacity. Such powers clearly go beyond standard fact-finding procedures and are more appropriate for prosecutorial or investigative bodies (national or international).

As resolution 71/248 clearly runs counter to the Charter of the United Nations, the proposed "mechanism" cannot be considered "a subsidiary body established by the General Assembly", as stated in paragraph 38 of the report, nor can it have any legal standing; this "mechanism" cannot enjoy privileges and immunities under the Convention on the Privileges and Immunities of the United Nations (paragraph 38), nor can it possess the legal capacity to conclude agreements with States and other entities (paragraphs 18 and 37). For these same reasons, no "head" or "deputy head" of the "mechanism" can be appointed, nor can a secretariat of the "mechanism" be formed, nor can voluntary contributions be accepted to support the establishment and operation of the "mechanism". Voluntary contributions may be used within the Organization solely in order to advance the objectives of its Charter.

The report is marked by other legal flaws as well, including, inter alia, paragraph 21, (which vests the "mechanism" with the power to deny a State access to information on the basis of the "mechanism's" perception that such State does not respect international human rights law and standards). While it covers a number of issues in detail, this document contains no provisions on procedural requirements and guarantees, stating only that the matter will be covered in the rules of procedure adopted by the "mechanism" itself.

Accordingly, any information or evidence "collected, consolidated, preserved and analysed" by this "mechanism" may not be used for purposes of any potential criminal proceeding (either national or international). Should this "mechanism" be

established despite the legally untenable decisions and measures already taken, the Russian Federation sees no possibility of cooperating with it. We call on other States to take the same position.

The Permanent Mission of the Russian Federation to the United Nations would be grateful if the present note verbale could be circulated as a General Assembly document, under agenda items 31 and 84.
